

REMARKS:

The Examiner rejected Claims 1-3, 5, 6, 9, 12-16, and 18-25 under 35 U.S.C. 103(a) as being unpatentable over Examiner Official Notice citing: U.S. Patent No. 5,209,565 issued to Goncalves; U.S. Patent No. 4,823,985 issued to Grollier et al.; U.S. Patent No. 4,294,293 issued to Lorenz et al.; and U.S. Patent No. 5,554,197 issued to Assini in view of: U.S. Patent No. 4,506,783 issued to Morganroth; U.S. Patent No. 1,056,218 issued to Sahl; U.S. Patent No. 6,440,175 issued to Stanley, III; and U.S. Patent No. 4,209,027 issued to Morganroth.

The Examiner states that the first four patents cited are "extrinsic evidence" of the state of the art for purposes of "Examiner's Official Notice" and that the last four are what the rejections are based on. However, what the Examiner is actually doing is using eight references to render obvious applicant's claims. Otherwise, the Examiner could cite twenty or even thirty patents as "extrinsic evidence" or "Examiner's Official Notice" to circumvent the well-established rule that the Examiner cannot use prohibited "hindsight" to establish obviousness.

Applicant submits that the combination of references is not proper and that the rejection is based on hindsight. In support of the non-obviousness of applicant's combination product and method, applicant cites the case of In re Fine, Court of Appeals, Federal Circuit (1988), 5 USPQ 2d 1596:

As stated in the court in In re Fine (supra), at 1598:

The PTO has the burden under section 103 to establish a prima facie case of obviousness... It can satisfy this burden only by showing **some objective teaching in the prior art or that knowledge generally available** to one of ordinary skill in the art **would lead that individual to combine the relevant teachings of the references.**

As further stated in the court in In re Fine (supra), at 1599:

Obviousness is tested by "what the combined teachings of the references would have suggested to those of ordinary skill in the art...But it **"cannot be established** by combining the teachings of the prior art to produce the claimed invention, **absent some teaching or suggestion supporting the combination.**"...And **"teachings of references can be combined only if there is some suggestion or incentive to do so."**

As further stated in the court in In re Fine (supra), at 1600:

"To imbue one of ordinary skill in the art with **knowledge of the invention** in suit, **when no prior art** reference or references of record convey or **suggest that knowledge**, is to fall victim to the insidious effect of **hindsight syndrome wherein that which only the inventor taught is used against its teacher.**"

As further stated by the court in In re Fine (supra), at 1600:

One cannot use hindsight to pick and choose among isolated disclosures in the prior art **to deprecate the claimed invention.**

This prohibition of using hindsight to pick and choose between the disclosures of the various references to determine obviousness is fundamental to the question of obviousness. Applicant asserts that the Examiner is using such hindsight to pick and choose from among the cited references to determine that applicant's invention is obvious. None of the cited references alone or together disclose or suggest applicant's broadest combination of Claim 1 of at least one measuring device, a mixing container, a stirring device, an applicator device, and a carrying device. If such combination were obvious, then applicant contends that there would be such products on the market, however, applicant is unaware of any such product.

At most, the cited references (the four actual reference patents, and not the non-permitted "Examiner Official Notice" patents) disclose the following:

Morganroth (4,506,783): Discloses single and multiple flexible plastic bags of bleach powder (for single and multiple bleaching sessions) capped with screw type caps that may include a valve and a brush, the bag with extra bleach powder and mixed with developer being disposed of, a bottle of the developer with a snippable tapered tip, gloves, and a carton to contain everything. Also discloses mixing spoon, mixing bowl. Mix bleach powder and developer in bag by squeezing. Has no way to measure the bleach powder and developer, but rather mix to desired consistency or viscosity.

Sahl (1,056,218): Discloses a drawstring bag for containing toilet articles.

Stanley, III: (6,440,175): Discloses a carded hair coloring kit that includes a capped bottle of base composition, a plurality of single use capped vials with eyedroppers of color concentrate, and a mixing container with a finger pump spray cap in which to the two together. Each vial may have a medicine dropper or a syringe.

Morganroth: (4,209,027): Discloses squeeze bottles for mixing two-part hair treating liquids that include valved caps with applicator tips and brushes. Also discloses the use of a stirrer to mix the two parts.

Specifically regarding Claims 2 and 3, there is no disclosure in any of the above cited references of using a mixing bowl that is either reusable or disposable (Claim 2). Likewise, materials are not mentioned such as the mixing bowl of the reusable type "being made of a substantially rigid and cleanable material... of glass, ceramic,... [or] plastic." (Claim 3). Therefore, Claims 2 and 3 are additionally non-obvious.

Specifically regarding Claims 5, 6, and 9, there is no disclosure in any of the above cited references in which the measuring device is a measuring cup (Claim 5). The syringe is mentioned in passing in Stanley, III but specifics of the syringe having... "a transparent tubular mid-section with a measuring indicia and an elongate tapered needle adapted to be closely received within necks of squeezable tubes to receive the hair coloring composition contained therein...." is not disclosed (Claim 6). Likewise not disclosed is "the syringe includes a pair of finger engaging tabs and the plunger includes a thumb ring to facilitate withdrawal of said plunger from said body..." (Claim 9). Therefore, Claims 5, 6, and 9 are additionally non-obvious.

Specifically regarding Claims 13 and 14, there is no disclosure in any of the above cited references in which the applicator brush has a "handle... [that] is longitudinally tapered, having a wide bristle receiving end from which the plurality of bristles longitudinally extend, and an opposite end adapted for manipulating hair of a type chosen from the group consisting of a pointed end and a curled end." (Claim 13). Likewise, nothing is disclosed about "respective ends of the bristles are aligned relative to the handle in an orientation... of... angled." (Claim 14). Therefore, Claims 13 and 14 are additionally non-obvious.

Specifically regarding Claims 15 and 16, there is no disclosure in any of the above cited references in which the stirring device "comprises a stirring stick of a type chosen from the group consisting of reusable and disposable." (Claim 15). Likewise, nothing is disclosed about the stirring stick being "made of a substantially rigid and cleanable material... of glass, plastic,... [or] wood." (Claim 16). Therefore, Claims 15 and 16 are additionally non-obvious.

Specifically regarding Claims 18 and 19 which include a drawstring bag, applicant contends that the "Traveling Requisite In Bag Form" of Sahl is non-analogous art as applied against applicant's

invention of "Hair Roots Coloring Kit". In support thereof, applicant points out that Sahl's device is in U.S. Class 383/40, "Flexible Bags/Compartmented/Including Auxiliary Compartment" whereas applicant's device is likely in U.S. Class 8/405, Bleaching and dying; fluid treatment and chemical modification of textiles and fibers/hair dying (the same as Stanley, III). The Sahl device is a flexible bag used to store toilet articles. It is not likely that a person skilled in the design of hair roots coloring kits would look to the art of bags for toiletries. Therefore, applicant asserts that Claims 18 and 19 are non-obvious and should be allowable. Additionally, the Examiner admits "the lack of evidence that such bags have been used for hair dye kits". Although he concludes that it would be obvious to include a drawstring bag, this statement contradicts that. You cannot state that you have no evidence to do so then state that it would be obvious to do so anyway. Therefore, Claims 18 and 19 are additionally non-obvious.

Specifically regarding Claims 20-23, there is no disclosure in any of the above cited references which include "a cleaning brush" (Claim 20) "having an elongate handle with a gripping portion and a cleaning portion to which a plurality of bristles radially extend." (Claim 23). Likewise, there is no disclosure of "a plurality of pairs of the protective gloves which are made of fused sheets of thin plastic" (Claim 21) that "are pre-packaged in tearable packages to maintain said gloves in a compact folded condition prior to use." (Claim 22). Therefore, Claims 20-23 are additionally non-obvious.

Specifically regarding Claims 24 and 25, the above arguments apply. Therefore, Claims 24 and 25 are additionally non-obvious.

Even if the first four patents cited as "extrinsic evidence" of the state of the art for purposes of "Examiner's Official Notice" are included, they only disclose the following:

Goncalves (5,209,565): Discloses capped tubes of dye paste, a mixing pot with a removable cap that contains oxidizing paste, and a brush that can be used for mixing and applying.

Grollier et al. (4,823,985): Discloses single-use flexible plastic sachets or pouches that separately contain, for example, oxidation dye and hydrogen peroxide. Snipping off an outlet area of the pouch and squeezing the pouch causes an even amount of each component to exit the pouch. Also discloses mixing the components in a bowl using a brush. The pouches cannot be resealed and thus presumably non-reusable.

Lorenz et al. (4,294,293): Discloses a mixing container with a calibrated measuring scale, and that combining proper quantities of dye paste and liquid oxidant is important.

Assini (5,554,197): Discloses tubes of dye paste and a measuring pad to measure column lengths of squeezed hair dye.

These do not render applicant's any of applicant's claims obvious alone or in combination with any of the other cited patents. Even if the devices disclosed in these patents were somehow combined, the resulting kit would not be that of applicant.

The Examiner objected to Claims 7 and 8 as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims. Applicant has rewritten Claims 7 and 8 in such form which should now be allowable.

All of the pending Claims 1-3, 5, 6, 7, 8, 9, 12-16, and 18-25 should now be allowable.

Favorable reconsideration is respectfully requested.

Respectfully,
LAW OFFICE OF BRIAN R. RAYVE

A handwritten signature in black ink, appearing to read "Brian R. Rayve", written in a cursive style.

Brian R. Rayve
Attorney for Applicant
Registration No. 39,810

September 12, 2007
Park City, Utah
amd.wpd